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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 22 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In Re)	
)	
LOLI, INC.)	File Nos. 9408840041; 9408840057;
)	9408840187; 9408840207;
)	9408840045; 9408840067;
Licensee of Interactive)	9408840111; 9408840140;
Video and Data Services)	9408840162; 9408840184;
("IVDS"))	9408840217; 9408840221;
)	9408840228; 9408840276;
)	9408840319; 9408840438;
)	9408840456; 9408840477

To: The Commission

Request For Waiver or Request For Rulemaking

Loli, Inc. ("Loli"), through its attorneys and pursuant to Sections 1.3 and 1.401(a) of the Commission's Rules, hereby requests that the Commission waive Section 95.833 of its Rules or in the alternative, issue a Notice of Proposed Rulemaking ("NPRM") pertaining to the Interactive Video and Data Service ("IVDS") construction benchmarks. As is demonstrated herein, Section 95.833 is not only inappropriate in an auction licensing context, but it is also economically burdensome upon, and counterproductive to, the overall development of the IVDS industry. Accordingly, the Commission should either waive Section 95.833 for all IVDS auction licensees or immediately undertake an expedited NPRM, such that all comments and replies must be received prior to August 1, 1995. Loli further requests that the Commission issue an Order in the NPRM by no later than September 15, 1995.^{1/}

^{1/} To Loli's knowledge, the companies that have received FCC authorization to provide IVDS equipment as of June 20, 1995 demand (continued...)

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***I. Construction Benchmarks Are Unnecessary
In An Auction Licensing Context***

1. Section 95.833 of the Commission's Rules was promulgated in the context of grants by random selection, when the licensees paid only the \$35.00 application filing fee and, accordingly, had very little risk involved in attempting to comply with the Commission's construction requirements.^{2/}

2. In addition, the Commission could be reasonably concerned that entities which received their licenses pursuant to a lottery could be candidates for warehousing spectrum because they had no measurable economic basis in applying for a license, had no investment to recoup, and thus may have had no real intention to develop promptly the IVDS business.

3. By contrast, the IVDS licensees, who obtained their authorizations by competitive bidding, paid fair market value for their licenses and have every reason - indeed millions of reasons - to develop their licenses promptly and assertively in order to recoup their investments and provide returns to their investors.

^{1/}(...continued)

a sixteen (16) week lead-time for equipment orders. With the current FCC construction deadline of January 17, 1996, for the first set of IVDS licenses, equipment orders would have to be made by September 1, 1995. Accordingly, Loli requests that the NPRM be completed and an Order issued prior to September 15, 1995.

^{2/} The risk was all the less because the Commission had reduced the filing fee from \$1400 per application to \$35. See Interactive Video and Data Services (Second Memorandum Opinion and Order), 8 FCC Rcd 2787, 2788-89 (¶11) (1993).

Loli, for one, has already paid \$808,699.92 for its authorizations.

4. IVDS Auction licensees like Loli have risked substantial capital, notwithstanding the lack of readily available equipment to provide a true interactive service. The Commission rightly rejected the availability of equipment as a basis for postponing initial payments. Request for Waivers in the First Auction of 594 Interactive Video and Data Service Licenses, 9 FCC Rcd 6384 (Com. Car. Bur. 1994). However, the Commission should not penalize licensees like Loli who made their downpayments and initial deposits. Requiring payments in the face of knowledge of equipment scarcity is one thing; requiring construction when no serviceable equipment is available is quite another.

***II. Construction Benchmarks Will Cause Unproductive Spending
And Will Delay The Development of IVDS***

5. Under normal circumstances, requiring licensees who paid fair market value for their IVDS licenses to construct their systems in accordance with an arbitrary timeline would be imprudent. However, in this context, it is double jeopardy: licensees would be doubly harmed because the IVDS industry has been slow to develop -- so slow in fact that there is no large scale equipment vendor, content provider or other infrastructure provider in place. This "snail's-pace" development has left IVDS licensees in the lurch: unable to order equipment or even to design a "programming" offering. Conversely, no equipment standard has

developed that would define the range and scope of programming content that could be offered to the public.^{3/}

6. The other leg of the double jeopardy stool created by the construction deadline is that it requires auction winners to focus exclusively on "saving" their licenses, and precludes a thoughtful, prudent, practical and efficient regional plan with other IVDS licensees - lottery and auction winners alike - through which opportunities for equipment standardization, volume purchases, regional footprints and expedited service to the public would all be increased.

7. The Commission has authority to waive a specific provision of its rules if such waiver is in the public interest, as here. See Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969) cert. denied, 409 U.S. 1027 (1972)). The licensees who paid full market value deserve the opportunity to pioneer the IVDS industry free from outdated and artificial construction deadlines. Other licensees have already addressed the

^{3/} In fact, the only group that would be advantaged by the continuation of the construction benchmarks would be the companies which will offer "license saver" equipment. These very minimal systems will meet the Commission's technical requirements, but will not be commercially viable. Accordingly, licensees would be forced by this artificial deadline to install ineffectual equipment, at substantial cost, without any public benefit because no viable service to the public will result.

many challenges faced by the IVDS licensees, challenges that no one, including the FCC, anticipated.^{4/} The public interest is not advanced by the rigid application of construction benchmarks. The construction requirement for the auction winners is particularly onerous and even ironic because the Commission has already waived the first year construction benchmark for the top 9 markets. See Interactive Video and Data (IVDS) Licenses, Order, 10 FCC Rcd 4014 (Wir. Telecom. Bur. 1995). Indeed, there is no valid reason to require auction licensees to abide by the construction benchmarks. Therefore, the Commission should waive Section 95.833 of the Rules for all auction licensees.

8. If the Commission determines that a Notice of Proposed Rulemaking ("NPRM") is the best method to address this issue, Loli respectfully requests that the Commission issue the NPRM within ten (10) days; establish a tight timetable for Comments and Reply Comments; and adhere to an internal deadline of September 15, 1995, as the date by which the Commission would issue a Public Notice eliminating the construction benchmarks.


9. Much is at risk in the prompt resolution of this issue and the Commission should do the right thing by waiving or otherwise lifting the construction deadlines.

^{4/} See March 28, 1995, filing by the IVDS Equipment Coalition (of which Loli is a member), as supplemented on June 1, 1995.

WHEREFORE, these premises considered, Loli respectfully requests that the Commission waive or otherwise terminate Section 95.833 of the Commission's Rules for all IVDS auction winners and that it do so through an Order issued no later than September 15, 1995.

Respectfully submitted,

LOLI, INC.



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